

ORIGINAL
FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 2 1990

Federal Communications Commission
Office of the Secretary

In the Matter of

Maintaining The Confidentiality
Of Proprietary Customer Data
Submitted In Accord With
Section 90.179(e) Of The Rules

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RM-7407

To: The Commission

COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER"), pursuant to Section 1.405(a) of the Commission's Rules, 47 C.F.R. §1.415(a), hereby respectfully submits its Comments in response to the Petition for Rule Making in the above-captioned proceeding.¹

I. BACKGROUND

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of licenses in the private land mobile radio services. NABER has five membership sections representing Users, Private Carrier Paging licensees, Radio

¹Public Notice No. 3838, released July 2, 1990 (hereinafter "Notice").

Dealers, Technicians and Specialized Mobile Radio operators. NABER's membership comprises over 6,000 of these businesses and service providers holding thousands of licenses in the private land mobile services.

For the past 19 years, NABER has been the recognized frequency coordinator in the 450-470 MHz and 470-512 MHz bands for the Business Radio Service. NABER is also the Commission's recognized frequency coordinator for the 800 MHz and 900 MHz Business Pools, 800 MHz "old" conventional channels for Business eligibles and conventional SMR Systems, and for the 929 MHz paging frequencies. In its Report and Order in PR Docket No. 83-737, the Commission designated NABER as the frequency coordinator for all Business Radio Service frequencies below 450 MHz and, in a joint effort with the International Municipal Signal Association ("IMSA") and the International Association of Fire Chiefs ("IAFC"), the Special Emergency Radio Service frequencies.

In the proceeding several operators of two-way private carrier and private carrier paging facilities (hereinafter "Petitioners") have requested that the Commission amend Section 90.179(e) of the Commission's Rules to provide that information submitted to frequency coordinators regarding a private carrier's customers is considered proprietary and confidential and that the frequency coordinator be banned from providing the information any person except Commission staff. As a coordinator of frequencies used for

private carrier communications and an association representative of users and providers of private carrier service, NABER has an interest in the outcome of this proceeding.

II. COMMENTS

First, it should be noted that the Petition is in most respects repetitive of a Petition filed by the same law firm on its own behalf on October 24, 1989.² In response to the Petition, the Private Radio Bureau stated that it would return the Petition without further consideration as the Petition did not satisfy the requirements of Section 1.401 of the Commission's Rules. Specifically, the Bureau rejected the Petition as it was "speculative in nature and lacks sufficient data or documentation to support the proposed amendment."³ Further, the Bureau noted that to the extent that information provided to the frequency coordinators was misused, "private carriers have a cause of action and adequate remedy in the courts." The Bureau stated that it was "unnecessary to provide additional remedies for wrongs that are already capable of being adequately redressed in other forums."

The instant Petition does not make mention of the previous filing, nor does the Petition state how it is different from the earlier Petition or why the new Petition should receive different

²A copy of the Petition is attached hereto.

³Letter from Ralph A. Haller, Chief, Private Radio Bureau, Ref. No. 7210-00, dated January 20, 1990. A copy of the response

consideration from the Bureau. Instead, the Petition states that one Petitioner is "not comfortable" with providing customer lists to the frequency coordinator that the other Petitioners are "concerned" with their compliance with 90.179(e). The Petition does not mention any instances where such information was abused.

It is NABER's view that the second Petition fails to overcome the infirmities of the first Petition in that the Petition is speculative in nature and other remedies are available to aggrieved parties. Therefore, the second Petition should also be dismissed.

Although it is NABER's view that the Petition fails to meet the requirements of Section 1.401 of the Commission's Rules, NABER wishes to state that as a matter of practice it does follow the Commission's expectation as stated in its January 29, 1990 letter that "frequency coordinators will make use of private carrier customer lists for coordination purposes only."

It should also be noted, however, that it is questionable whether private carrier customer lists are indeed confidential. In this regard, the private carrier form of licensing was created as a means by which entrepreneurial systems could bring service to users without the need to file individual applications. Private carriers were not created for the purposes of permitting entrepreneurs to keep customer lists secretive.

The 800 MHz SMR System is another type of private carrier system. Such systems require end user licensing in greater detail

than the customer lists required by Section 90.179(e). Yet such information about end users is readily available to any person from the Commission.

Further, there may be cases where other licensees or applicants need to review the customer lists for coordination purposes. For example, if an applicant for a new station disputes the number of users which the private carrier claims to have on its system, the applicant should be entitled to review the customer list in order to resolve the dispute.⁴ In this regard, the Commission has recently ruled that a list of the names, addresses and car registrations of persons using a private land mobile radio station are discoverable under the Freedom of Information Act so that an opposing party can research the information to confirm it's accuracy.⁵ Therefore, it would appear that, although frequency coordinators may not be permitted to provide customer lists to persons other than the Commission for matters other than frequency coordination, such information is readily discoverable by the public if it is filed with the Commission. Thus, there is little need for the rule change.

Based on the above, NABER believes that amendment of the rule as proposed; (1) is not necessary as alternative remedies already

⁴The customer list should be obtained by the applicant from the Commission, not the frequency coordinator.

⁵See FOIA No. 90-127.

exist; (2) the percieved problem is speculative; (3) the information is not routinely given out by frequency coordinators; (4) the proposal may not be within purpose for creation of private carriers; and (5) the proposal will not achieve its desired effect, in that other parties may acquire the information from the Commission. Therefore, NABER does not support the issuance of a Notice of Proposed Rule Making in this matter.

III. CONCLUSION

WHEREFORE, the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

National Association of
Business and Educational
Radio, Inc.

By: 
David E. Weisman, Esquire

By: 
Alan S. Tilles, Esquire

Meyer, Faller, Weisman
& Greenburg, P. C.
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Washington, D. C. 20015
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Date: August 2, 1990

CERTIFICATE OF SERVICE

I, Ruth A. Buchanan, a secretary in the law offices of Meyer, Faller, Weisman & Greenburg, P. C. hereby certify that I have on this 2nd day of August, 1990 sent by First Class United States Mail, postage prepaid, a copy of the foregoing "Comments" to the following:

*

Ralph A. Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

*

Richard J. Shiben, Chief
Land Mobile and Microwave Division
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W.
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Washington, D.C. 20554

Robert H. Schwaninger, Jr., Esquire
Brown & Schwaninger
1919 Pennsylvania Avenue, N.W.
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Washington, D.C. 20006
Counsel to Petitioners

* - Via Hand Delivery


Ruth A. Buchanan

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

January 29, 1990

IN REPLY REFER TO:

7310-09

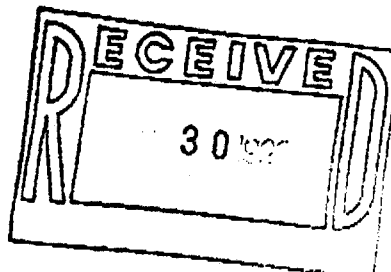
Brown and Schwaninger
1919 Pennsylvania Avenue, N.W.
Suite 504
Washington, D.C. 20006

Dear Messrs. Brown and Schwaninger:

This letter is in response to your October 24, 1989, petition to amend Section 90.179(e) of the Commission's Rules, 47 C.F.R. § 90.179(e). Your firm requests amendment of Section 90.179(e) to require frequency coordinators to consider private carrier customer lists proprietary and confidential. You contend that protecting customer lists would prevent unfair competition that could result if competitors obtain such lists from coordinators and then target the customers for their own benefit. You further argue that affording such protection would improve private carrier compliance with coordinators requests under Section 90.179(e) because private carriers could submit end user information without fear that their competitors might use this information unfairly.

Your petition must be returned without further consideration because it does not satisfy the requirements set forth in Section 1.401 of the Commission's Rules. 47 C.F.R. § 1.401. Namely, in order for the Commission to consider a petition for rule making, the petitioner must set forth the text of the amendment, facts, views, arguments and data supporting the proposal and how the interests of the petitioner would be affected. If a petition is premature or does not warrant consideration by the Commission, the Commission may deny the petition. See 47 C.F.R. § 1.401(e). We must dismiss your petition without prejudice because it is speculative in nature and lacks sufficient data or documentation to support the proposed amendment.

We further observe that the problem your petition identifies is indistinguishable from ordinary forms of unfair competition. State and local jurisdictions widely recognize a cause of action where proprietary information is used to tortiously interfere with business relationships or otherwise engage in unfair competition. Should coordinators or other entities make improper use of private carrier customer lists, private carriers have a cause of action and adequate remedy in the courts. We find it unnecessary to provide additional remedies for wrongs that are already capable of being adequately redressed in other forums. We do, however, expect as a matter of policy that the frequency coordinators will make use of private carrier customer lists for coordination purposes only.



We conclude that your petition has not provided the Commission with sufficient supportive material to consider amending Section 90.179(e) in the manner proposed. The existing rules are designed to facilitate the frequency coordination process, and we will not modify them absent substantial evidence that such action is necessary or in the public interest.

In view of the above, IT IS ORDERED that the Petition for Rule Making filed by Brown and Schwaninger IS HEREBY DISMISSED. This action is taken under the authority set forth in Section 0.331, 1.401, and 1.407 of the Commission's Rules. 47 C.F.R. §§ 0.331, 1.401, and 1.407.

Sincerely,

Dorothy H. Baker (for)

Ralph A. Haller
Chief, Private Radio Bureau

Copies to: American Automobile Association, Inc.
National Association of Business and Educational Radio, Inc.
International Municipal Signal Association
Forestry Conservation Communications Assoc.
Forest Industrial Telecommunications
American Association of State Highway and Transportation Officials
Associated Public-Safety Communications Officers Inc.
Manufacturers Radio Frequency Advisory Committee, Inc.
Alliance of Motion Picture and Television Producers
American Trucking Association, Inc.
Utilities Telecommunications Council
Association of American Railroads
International Association of Fire Chiefs, Inc.
American Newspaper Publishers Association
Special Industrial Radio Service Association, Inc.
International Taxicab Association
Telephone Maintenance Frequency Advisory Committee
Central Station Electrical Protection Association
Petroleum Frequency Coordinating Committee
Central Committee on Telecommunications
of the American Petroleum Institute

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Maintaining The Confidentiality Of)
Proprietary Customer Data Submitted To) FM No.
Coordination Entities In Compliance)
With Section 90.179(e) Of The Rules)

To: The Commission

PETITION FOR RULE MAKING

Dennis C. Brown and Robert H. Schwaninger, Jr. d/b/a Brown and Schwaninger ("we") hereby request that the Commission initiate a rule making proceeding to protect the proprietary interests of private carrier operators. As reasons for our proposal, we show the following.

Operators Should Be Protected

Access to a carrier's customer list is highly valuable. Once he has obtained a customer list, a competitor in the business of providing commercial radio communications service may then call on all of the carrier's customers to sow seeds of dissatisfaction. Even if not immediately successful in converting customers, this type of unfair competition often undermines the goodwill developed between the customer and the existing carrier. The stability of a carefully and honestly developed relationship between a carrier and its customers is disrupted and the continued economic viability of the existing carrier's business may be threatened.

Although we believe that vigorous competition is healthy and that competition based on price and service is beneficial to end users, the systematic targeting of every business served by a private carrier's system based on information proprietary to the victim carrier is not healthy competition. The courts have long discouraged such practices by allowing businesses to claim a proprietary interest in customer lists and to protect these lists from theft, removal, and disclosure by discharged employees and others. The courts and the Commission have, therefore,

¹ Although herein we refer to customers, we recognize that §90.179 applies to members of non-profit associations. We believe that the arguments made herein are applicable to those users as well. However, for ease of expression we will only refer to private carrier customers.

² In a context only slightly different, the Commission has refused to renew a Public Coast station license where the licensee violated Section 505 of the Communications Act of 1934 for the purpose of compiling a list of competitors' customers. Gulf Coast Communications, Inc., PR Docket No. 78-259 (FCC Memo 94809 Released April 18, 1982). In Gulf Coast, the Commission affirmed a decision by the Review Board holding that the wrong lay in the mere attempt to use the improperly obtained customer

provided protection for customer data which might be obtained through surreptitious means.

We believe that the Commission's Rules should not allow competitors in the communications marketplace to engage in a practice which would be unlawful competition in other industries. However, in a recently developed area, the Commission's Rules might provide an unintended opportunity for misuse of proprietary customer data.

Recently the National Association of Business and Educational Radio, Inc. has begun requesting customer lists from private carrier system operators in accord with Section 90.179(e) of the Commission's Rules. In adopting this Rule, the Commission decided that frequency coordination entities should receive this information to assist in the frequency coordination function and to maintain the integrity of the coordinators' data bases. We do not herein dispute the motivation, purpose, or application of that rule and do not request any change in the rule that would diminish or impair what it was intended to accomplish, or, in fact, accomplishes. However, in the course of assisting clients in making a proper response to NABER's request, we have recognized serious consequences were coordinating entities to make customer lists available to other persons.

We noted that the Commission's Rules fail to prevent the frequency coordinators from disclosing customer lists to other persons, and some of our clients have expressed concern over whether the information which they were providing to coordinating entities would be protected. We believe that customer information supplied to coordinating entities in accord with Section 90.179(e) should be held to be proprietary and confidential.

list, and that whether Gulf Coast had succeeded in diverting any competitor's customers was not significant.

³ The Commission's decision adopting §90.179(e), Memorandum Opinion and Order, PR Docket 83-737 (Released September 28, 1986) was silent on the matter of protection of private carriers' customer lists. Coordinating entities were provided no instructions regarding the handling of submitted information. Since we believe that this was a simple oversight by all of the parties to that rule making, we herein request that the Commission remedy this oversight.

⁴ Although disclosure of this information to a carrier's competitors is the most obvious concern, there are less obvious but equally important hazards from disclosure of the information to any unauthorized person. For example, were a frequency coordinator to disclose this information to an equipment vendor, the vendor might be disposed to share it with a competitor of the submitting carrier.

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Protection Will Encourage Compliance

If private carriers are assured that customer information will remain confidential with coordinating entities, it is probable that greater cooperation in complying with the Commission's Rules will occur. A carrier which believes that customer information provided to a coordinating entity might be used to upset his business is less likely to comply fully with the Rule and may seek methods of avoidance. The Commission is aware of problems with scofflaws of its Private Radio Services licensing procedures. Our proposal seeks to avoid incidents of carriers refusing to comply with Rule Section 90.179(e).

We have no knowledge that any frequency coordinating entity has yet sold, provided, or "leaked" this information to persons desiring private carrier customer lists. It may be that the directors of the coordinating entities have adopted a policy against such sales and diligently protect against the abuse. However, the sensitivity and the competitive value of customer data demands that applicants and licensees receive greater assurance through adoption of a Rule that will give positive protection.

Suggested Rule Change

We suggest that Section 90.179(e) of the Commission's Rules be revised by adding the following sentence:

All information provided to the frequency coordinator in compliance with this section shall be deemed to be proprietary and confidential and shall not be disclosed in any manner by the frequency coordinator to any person who is not a member of the Commission's staff.

Conclusion

For the reasons stated herein, we respectfully request that the Commission initiate a rule making to include the above suggested language within its Rules.

⁵ We recognize that the Commission is often reluctant to revisit rule making decisions until substantial time has passed. In this instance, however, we believe that the risks which we have shown had simply not been recognized during the earlier proceeding. Since our suggestion would make no essential change in the intended operation of the current rule, we respectfully suggest that no proper benefit could be gained by delay and that the time is ripe to consider our suggestion.

Further, because the Commission's enforcement efforts have been restricted by the level of available funds, the harm that could flow to a carrier before the Commission could consider adoption of the suggested rule in the course of an adjudication could be so great as to prove fatal to the victim carrier's business. Accordingly, we suggest that the time to adopt the suggested rule is before the first incident of abuse is documented.